IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Arbitration Petition No. 26 of 2007

Deepa Travels Pvt. Ltd. ... .. Petitioner
V/S
Airport Authority of India & ors. . . Respondents

Mr. Girish Godbole i/b. Vinay Hegde for petitioner.
Mr. P. K. Samdhani, Sr. Advocate i/b. M. V. Kini & Co., for respondent no.1.

CORAM: **D.G. KARNIK J**.

DATE: 28/2/ 2007

P.C.:

1. Heard the learned counsel. By consent the petition is heard finally at the stage of admission.
2. By this petition under section 9 of the Arbitration and Conciliation Act, 1996 (for short the "Arbitration Act"), the petitioner claims injunction against the recovery of the past service tax and encashment of a bank guarantee for the recovery of the alleged arrears.
3. The short question that is required to be considered is whether the petitioner has made out a prima facie case that

service tax claimed by the petitioner, is payable by him.

4. By a licence agreement dated 17th May 2005 the respondent, the Air Port Authority of India granted licence to the petitioner to use a small portion the premises at its domestic air port terminal in Mumbai. The licence agreement recites that the petitioner shall pay to the respondent licence fee as specified in clause 2 of the licence agreement. The respondent has demanded from the petitioner service tax on the amount of licence fee paid by the petitioner from September 2004 to 31st March 2006.

5. Sub clause (zzm) of clause 105 of Chapter 5 of the Finance Act 2003 says that the taxable service includes any service provided or to be provided to any person by airports authority or any person authorised by it in an airport or a civil enclave. Thus the service tax would be payable in respect of any payment made to the respondent, the respondent, the Air Port Authority of India, by any person in respect of any service provided by Air Port Authority. In the present case the petitioner is not providing any service to the respondent.

The petitioner is only paying licence fee for the use of the premises allowed to be used by the respondent. In the circumstances, prima facie, service tax is not payable by the petitioner in respect of the licence fee paid by it to the respondent as the fee is not for any service provided by the respondent.

6. The licence agreement provides for settlement of disputes by arbitration. The petitioner has invoked the arbitration clause and a petition under section 11 of the Arbitration Act has been filed for appointment of an arbitrator. The issue whether the petitioner is liable to pay service tax is to be finally decided by the arbitrator. However, it prima facie appears that the petitioner is not liable to pay the service tax and is therefore, entitled to an injunction. For these reasons the petition is allowed. The respondent is restrained from recovering from the petitioner service tax for the period 10.9.2004 to 20th February 2006, by any coercive means means including enhancement of the bank guarantee.

7. Needless to say that the observations made in this petition are

made only for the purpose of considering prima facie case and the learned arbitrator shall be entitled to decide the issue in question without in any way influenced by the observations made in this order.

(D.G. KARNIK J.)